

NTSB Order No. EA-4378

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of July, 1995

Docket SE-13912

the reasons discussed below, respondent's appeal is denied and the law judge's order of dismissal is affirmed.

On November 19, 1994, respondent was served with an emergency order revoking his airline transport pilot and flight engineer certificates based on his alleged violation of 14 C.F.R. 61.14 and 121.455(c).² Pursuant to our rules of practice applicable to emergency proceedings (49 C.F.R. Part 821, Subpart I), respondent could challenge the revocation by filing a notice of appeal within 10 days,³ or by November 29, 1994. A description of respondent's appeal rights, including the 10-day time period for filing an appeal, was included in the order of revocation.

On December 5, 1994 -- six days after the expiration of the 10-day period for appealing -- respondent submitted his notice of appeal, along with a motion asking the Board to accept what he then acknowledged was a late-filed appeal. Respondent offered no explanation for his untimeliness, but asserted that the

² It was alleged that respondent, a pilot for United Parcel Service, violated 14 C.F.R. 61.14 (refusal to submit to drug test) when, in connection with a random drug test pursuant to a program under Appendix I of 14 C.F.R. Part 121, he submitted a urine sample which was found to have been adulterated with a substance capable of concealing the presence of marijuana. It was also alleged that he violated 14 C.F.R. 121.455(c) when he served as pilot in command of several flights after his alleged refusal to submit to the drug test.

³ At that time, 49 C.F.R. 821.55(a) provided: "*Time within which to appeal.* Within 10 days after the service of the Administrator's emergency order on the certificate holder, he may file an appeal therefrom to the Board." [Although the regulations have since been revised, the 10-day requirement remains unaffected.]

Administrator was improperly attempting to revoke his certificates based on a non-existent legal theory (i.e. the premise that adulteration of urine constitutes a refusal to be drug tested). On that same day (December 5, 1994), the Administrator filed the order as his complaint,⁴ and also filed a motion to dismiss respondent's appeal as untimely, citing respondent's failure to provide good cause for his delay. The Administrator subsequently filed an opposition to respondent's motion for leave to file a late appeal, pointing out that the Board has excused untimely filings only upon a showing of good cause, and that respondent had shown none.

By letter dated December 15, 1994, respondent informed the Board that he was waiving the applicability of the emergency rules, and asserted that his notice of appeal was timely because it had been filed within the period provided for appeal in non-emergency proceedings (20 days). 49 C.F.R. 821.30(a). In the alternative, he argued that the untimeliness of his appeal should be excused for good cause. However, rather than offering any explanation for his delay, he asserted that the (in respondent's view) lack of any legal basis for the Administrator's action in this case constituted "good cause" for accepting an untimely appeal in this case.

On December 21, 1994, the law judge dismissed respondent's appeal, finding that respondent had failed to show the requisite good cause for his untimeliness. Regarding respondent's

⁴ Respondent also filed an answer to the complaint.

contention that his waiver of the emergency rules extended the appeal-filing period from 10 days to 20 days, the law judge noted that a similar argument was rejected in Administrator v. Myers, 5 NTSB 997 (1986).

On appeal from the law judge's order, respondent retreats from his earlier acknowledgment that his appeal was untimely because it was filed beyond the 10-day period set forth in our emergency rules, and rests exclusively on the contention that his appeal was timely because it was filed within 20 days of his receipt of the order of revocation. Respondent offers two new arguments in support of his position that the 20-day appeal period contained in our non-emergency rules⁵ -- rather than the 10-day period set forth in our emergency rules -- applied in this case.

First, respondent cites 49 C.F.R. 821.54(b),⁶ and argues that our emergency rules did not govern this case until the Administrator had filed his complaint, thereby notifying the Board of the emergency nature of this proceeding. Thus, according to respondent's argument, since the Administrator had not yet filed his complaint at the time respondent filed his

⁵ See 49 C.F.R. 821.30(a).

⁶ **§ 821.54 General.**

* * *

(b) *Effective date of emergency.* The procedure set forth herein shall apply as of the date when the Administrator's written advice of the emergency character of his order has been received by the Office of Administrative Law Judges or by the Board.

notice of appeal, our non-emergency rules were applicable by default. It is undisputed that respondent filed his notice of appeal within 20 days of his receipt of the order.

Respondent's interpretation of section 821.54(b) is incorrect. That section specifies the effective date of the emergency only for purposes of calculating the statutory 60-day period⁷ within which the Board is obligated to finally dispose of an appeal from an emergency order.⁸ As section 821.54(a) makes clear, our emergency rules of procedure "apply to any order issued by the Administrator as an emergency order . . . in cases where the respondent appeals or has appealed to the Board therefrom." Indeed, the 10-day appeal period set forth in our emergency rules -- which was recited in the order respondent received, and which respondent himself implicitly acknowledged was applicable when he filed a motion to accept late-filed appeal along with his notice of appeal -- would be rendered meaningless if our emergency rules did not apply until after the Administrator filed his complaint.⁹

⁷ See 49 U.S.C. 44709(e) [formerly codified at 49 U.S.C. App. 1429(a)].

⁸ See Tur v. FAA, 4 F.3d 766 (9th Cir. 1993) and Grant v. FAA, 959 F.2d 1483 (9th Cir. 1992), both of which interpret section 821.54(b) in this manner. In Grant, the Court found that the respondent's notice of appeal from the emergency order in that case was untimely since it was not filed within the 10-day period set forth in our emergency rules, despite the fact that -- as in this case -- the Administrator did not give written notice to the Board until after that appeal had been filed.

⁹ Although respondent contends that the Administrator is free to invoke the emergency rules by notifying the Board of the emergency nature of an order at any time after its issuance

In the alternative, respondent argues that, even if our emergency rules were applicable to the order of revocation, his filing of a notice of appeal outside of the 10-day appeal period operated as a waiver of the applicability of the emergency rules, including the 10-day requirement. We rejected this same argument in Administrator v. Myers, 5 NTSB 997, at 998 (1986), where we said that an airman's ability to waive the applicability of the emergency rules "does not mean that an airman's failure to comply with a time limit established by the emergency rules will be treated as a waiver of those rules or as an election to proceed under the non-emergency rules." However, respondent maintains that this holding in Myers has been effectively overruled by several court decisions.

Specifically, respondent cites Tur v. FAA, 4 F.3d 766 (9th Cir. 1993); Grant v. FAA, 959 F.2d 1483 (9th Cir. 1992); and Stern v. Butterfield, 529 F.2d 407 (5th Cir. 1976). However, none of the propositions respondent cites from these decisions are inconsistent with our holding in Myers that a failure to comply with the 10-day appeal period, *without more*, does not

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(i.e., even before the respondent has appealed), the Administrator points out that it would be wasteful and needless to inform the Board of every emergency order issued, since the Board has no role in the matter unless the order is appealed by the respondent. Respondent acknowledges that the Administrator's practice has been to notify the Board of the emergency nature of an order when he files the complaint, following a respondent's appeal. The Ninth Circuit has gone so far as to equate the Administrator's written notice of the emergency with the Administrator's complaint, by stating that the written notice is "due" within 3 days of the notice of appeal, in accordance with 49 C.F.R. 821.55(c) (addressing the timing of the Administrator's complaint). Tur v. FAA, 4 F.3d 766 (9th Cir. 1993).

constitute a waiver of the emergency rules of procedure.¹⁰

Indeed, we stand by that holding in Myers, and wish to emphasize that our emergency rules govern appeals from emergency orders until such time as the respondent communicates to the Board in a clear and unambiguous fashion -- as respondent did in his letter of December 15, 1994 -- that he wishes to waive the emergency rules.¹¹

Finally, respondent sets forth several reasons why he believes his challenge to the order of revocation is meritorious.¹² However, we need not address these contentions,

¹⁰ In Stern, the issue was whether the Board was bound by the statutory requirement to finally dispose of the appeal within 60 days. The respondent in that case had waived his right to the expedited emergency procedures "only through the hearing stage."

In concluding that his waiver remained effective even after the hearing, the court cited several ways in which the respondent continued to treat the proceeding in a non-expedited fashion, including his failure to file a notice of appeal from the law judge's decision within the shortened emergency time frames. Accordingly, Stern is inapposite, because that case did not address whether an initial waiver could be implied solely from a late-filed notice of appeal from an order of revocation. In Grant, the Court suggested, in dicta, that *it could be argued* that a late-filed notice was sufficient to imply such a waiver, but the Court did not need to decide the issue in light of its disposition of the case. And Tur simply holds that a respondent has the right to waive the applicability of the emergency rules. Respondent was not denied that right in this case.

¹¹ In Myers, we made clear that the waiver must be filed within the emergency time frame (10 days) in order to extend the appeal period to the non-emergency time frame (20 days). Even if we were to retreat at all from our holding in Myers, it would only be to extend to 20 days the period of time in which such a specific notice of waiver could operate to alter the appeal period from 10 days to 20 days. However, such a modification to our position in Myers would not aid respondent, as his waiver in this case was not submitted until after the 20-day time period for appealing under the non-emergency rules had expired.

¹² Specifically, respondent states that he had no role in

since it is the propriety of the law judge's dismissal of respondent's appeal on timeliness grounds, and not the merits of the Administrator's order, that is before us.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal from the law judge's order is denied; and
2. The law judge's dismissal of respondent's appeal from the Administrator's order of revocation is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.

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the alleged adulteration of his urine specimen, and that there is no legal support for the Administrator's position that, at the time of this incident, adulteration constituted a refusal to be tested. In this regard, respondent asserts that, subsequent to this incident, the Administrator amended the definition of "refusal to be tested," in an attempt to cover this sort of situation.